93-688

Supreme Court, U.S.
FILED
SEP - 7 1993

No._____

In The
Supreme Court of the United States
October Term, 1993

STEPHEN A. HUISINGA,
Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS
Respondent.

Petition For Writ of Certiorari
To The Appellate Court of Illinois
Fourth Judicial District

JAMES L. AYERS
Attorney for Petitioner
114 S. Charter
Monticello, IL 61856
(217) 762-3661

Counsel of Record for Petitioner

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QUESTION PRESENTED FOR REVIEW

Whether Certiorari should be granted to determine whether the due process clause requires a state to follow its own statutory scheme when depriving a motorist of his driver's license based on the statutory scheme.

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Petitioner Stephen A. Huisinga respectfully prays that a writ of certiorari issue to review the judgment of the Appellate Court of Illinois, fourth Judicial District, entered in the above-entitled proceedings on March 11, 1993.

OPINION BELOW

The opinion of the Appellate Court of Illinois, Fourth Judicial District appears at 242 Ill.App.3d 418, 610 N.E.2d 168 (4th Dist. 1993). A copy of the slip opinion is attached to this petition as Appendix A.

The order of the Supreme Court of Illinois denying leave to appeal, entered June 3, 1993, is not reported and is attached as Appendix B.

JURISDICTION

The judgment of the Appellate Court of Illinois, Fourth Judicial District, was entered on March 11, 1993. (Appendix A) A petition for leave to appeal was denied by the Illinois Supreme Court on June 3, 1993. (Appendix B) This petition is being filed within ninety days of the Illinois Supreme Court's denial of leave to appeal. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTION PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution provides in pertinent part:

> No State shall ... deprive any person of life, liberty or property without due process of law ...

STATEMENT OF THE CASE

Stephen A. Huisinga was arrested for driving under the influence of alcohol (DUI). His driving privileges were summarily suspended for allegedly refusing to submit to chemical testing. After a hearing on his petition to rescind the suspension of his driving privileges, the circuit court entered an order denying rescission.

The court's denial of Mr. Huisinga's petition to rescind the statutory summary suspension was affirmed on direct appeal in an opinion reported at 242 Ill.App.3d 418, 610 N.E.2d 168 (4th Dist. 1993) (attached as Appendix A and hereinafter referred to as Slip Opinion). The opinion sets forth the facts applicable to the court at the hearing.

Among the arguments advanced on direct appeal was that Mr. Husinga "was never explicitly asked t take a breathalyzer test and therefore there could be no refusal upon which to base the statutory summary suspension, since there was neither a proper request nor an opportunity to take the test." (Slip Opinion at 3) In rejecting this claim, the Illinois Appellate Court held that

> "[w]hile the defendant was not explicitly asked in interrogative form to take the breathalyzer test, we find the trial court's conclusion defendant refused to take the test was not against the manifest weight of the evidence . . . . To reverse the trial court's ruling would eviscerate the purposes and meaning of the implied-consent statute . . . . Cases based solely on the failure of officers to ask defendants to submit to a breathalyzer test area complete waste of judicial resources." (Slip Opinion at 7-8)

The Illinois Supreme Court denied leave to appeal.

REASON FOR GRANTING CERTIORARI

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE DUE PROCESS CLAUSE REQUIRES A STATE TO FOLLOW ITS OWN STATUTORY SCHEME WHEN DEPRIVING A MOTORIST OF HIS DRIVER'S LICENSE BASED ON THAT STATUTORY SCHEME.

The private interest that brings the Due Process Clause into play is the license to operate a motor vehicle. Past decision of the Supreme Court have held "[i]t is clear that the Due Process Clause applies to the deprivation of a driver's license by a State." *Dixon v. Love,* 431 U.S. 105 (1977). Furthermore:

> "Suspension of issued licenses ... involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment."
>
> *Bell v. Burson,* 402 U.S. 535, 539 (1971).

The Petitioner's driver's license was suspended after an arrest for driving under the influence of alcohol for allegedly refusing to submit to a breathalyzer test. The relevant statute provides in part that

> "A person *requested* to submit to a test as provided above shall be warned by the law enforcement officer requesting the test that a refusal to submit to the test will result in the statutory summary suspension of such person's privilege to operate a motor vehicle as provided in Section 6-208.1 of this Code." (emphasis added)

625 ILCS 5/11-501.1 (1992) (formerly Illinois Revised Statutes Chapter 95½ Section 11-501.1).

The Appellate Court, in the decision from which we appeal, acknowledged the need for a request for a test before there can be a refusal for a test upon which a suspension could be based.

> "As case law suggests, the facts of a refusal must be based upon an objective review of the officer's question and defendant's response, and *there cannot be a refusal to take a test unless the driver is asked to take the test.* [emphasis added]

> ([*People v.*] *Brennan*, 122 Ill.App.30 at 603, 461 N.E.3d at 1068.) A defendant is considered to have refused to submit to a breathalyzer test 'where, after a clear warning of the ramifications resulting from a refusal [citation], *an officer explicitly asks* [emphasis added] a defendant whether he, or she, will take the test and the defendant, by word, act or omission, clearly refuses to take the test." *Brennan*, 122 Ill.App.3d at 603, 461 N.E.3d at 1068; see also *People v. Kern* (1989), 182 Ill.App.3d 414, 416, 538 N.E.3d 184, 186.

(alip Opinion at 6)

The Appellate Court then conceded the petitioner was not asked to take the test. "While defendant [petitioner] was not explicitly asked in interrogative form to take the breathalyzer test, we find the trial court's conclusion defendant refused to take the test was not against the manifest weight of the evidence." (Slip Opinion at 6)

The Appellate Court supported its decision by saying "[t]o reverse th trial court's ruling wold eviscerate the purpose and meaning of the implied-consent statute . . . ." (Slip Opinion at 7) It went on to say, "[b]y affirming the trial court's ruling in this instance, we do tnot condone the failure of police officers to ask a defendant in specific question form to submit to the chemical tests. Unless a defendant is completely uncooperative [which is not alleged here], an officer should explicitly ask a defendant to take the required test before he concludes a defendant has refused . . . . Cases based solely on the failure of officers to ask defendants to submit to a breathalyzer are a complete waste of judicial resources." (Slip Opinion at 8)

The appellate court's saying that cases based on an officer's failure to ask a defendant to submit to a breathalyzer are a waste of judicial resources may have some merit. But that is the fault of the officers and thus the State, not the Petitioner. The court's belief that a waste of judicial resources may be involved does not relieve it of the responsibility to decide fairly the issues before it. The Petitioner faces a suspension of his driver's license even though the statutory requirements for such a taking were not met. It is therefore respectfully requested that this Court grant certiorari and determine whether the due process clause requires a state to follow its own statutory scheme when depriving a motorist his driver's license based on that statutory scheme.

CONCLUSION

It is respectfully requested that this Court grant certiorari to review the decision of the Illinois Appellate Court.

Respectfully submitted,

JAMES L. AYERS
Attorney for Petitioner
114 S. Charter
Monticello, IL 61856
(217) 762-3661

Counsel of Record for Petitioner

NO. 4-92-0676

IN THE APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court
v.	)	County of Piatt
STEPHEN A. HUISINGA,	)	
Defendant-Appellant.	)	
	)	
	)	
	)	Honorable
	)	Arthur J. Powers,
	)	Judge Presiding.

FOR APPELLANT

D. Peter Wise
Kathryn Saltmarsh
Metnick, Barewin, Wise
& Cherry
Attorneys at Law
Vinegar Hill Building
107 West Cook Street
Springfield, IL 62704

James L. Ayers
Ayers & Shonkwiler
Attorneys at Law
114 South Charter Street
Monticello, ILl 61856

(Argued by D. Peter Wise)

FOR APPELLEE

Roger Simpson
State's Attorney
Piatt County Courthouse
Monticello, IL 61856

Norbert J. Goetten, Director
State's Attorneys Appellate
Prosecutor
151 Brusn Lane, Suite 103
Springfield, IL 62702
Robert J. Biderman
Deputy Director

Denise M. Ambrose
Senior Staff Attorney

(Argued by Denise M. Ambrose)

NO. 4-92-0676

IN THE APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, *Plaintiff-Appellee,* *v.* STEPHEN A. HUISINGA, *Defendant-Appellant.*	)	Appeal from Circuit Court County of Piatt
	)	Honorable Arthur J. Powers, Judge Presiding.

JUSTICE KNECHT delivered the opinion of the court:

Defendant, Stephen A. Huisinga, was arrested for driving under the influence of alcohol (DUI), pursuant to section 11-50(a) (2) of the Illinois Vehicle Code (Code) (IOll. Rev. Stat. 1991, ch. 95½ par. 11-501(a) (2)). His driving privileges were summarily suspended because he refused to submit to the chemical tests required by section 11-501.1 of the Code (Ill. Rev. Stat. 1991, ch. 95½, par. 11-501.1). After a hearing on his petition to rescind the suspension of his driving privileges, the circuit court of Piatt County entered an order denying rescission. Defendant appeals, arguing the arresting officer did not explicitly request him to take the test, and consequently, there could be no clear refusal upon which the statutory summary suspension could be predicated. We affirm.

The underlying facts of the case are not in dispute. On April 25, 1992, Deputy J. D. Russell of the Piatt County sheriff's department stopped defendant's vehicle on Route 150 for speeding. Upon approaching defendant's vehicle, Russell smelled an odor of alcohol emanating from inside the car. Russell observed defendant's eyes were glassy, watery and bloodshot. After asking defendant how fast he had been going, defendant began to argue with the deputy about

whether he had been speeding, and Russell noticed an odor of alcohol on defendant's breath and that his speech seemed to be "thick-tongued" and slower than normal speech. Russell then requested defendant perform various field-sobriety tests, which he later explained defendant failed. After completing the field-sobriety tests, defendant was asked to submit to a portable breathalyzer test. Defendant refused to take the test, and Russell then placed defendant under arrest for DUI.

Defendant was placed in the squad car and was admonished concerning the implied consent warnings for the administration of the breath or blood-alcohol tests. Russell testified he told defendant he would be offered the breathalyzer test at the county jail, but then asserted he believed what he actually told defendant was the test being offered at the Piatt County jail was the breathalyzer test. Russell then asked defendant if reasons defendant had been placed under arrest and was informed of the consequences of his refusal to take the required tests. He then unequivocally refused to take the tests. While it concedes the deputy's statement defendant would be offered the breathalyzer test at the jail was not in interrogative form, it contends defendant interpreted Russell's statement as a demand to take the test and proceeded to make an unequivocal refusal to take the test. Since Russell's statement conveyed to defendant a demand to take the test, defendant's response was a clear refusal to take the test. Citing *People v. Graziano* (1986), 151 Ill. App. 3d 475, 502 N.E.2d 822, it maintains once defendant stated his refusal to take the test, the officer was not required to give him a second chance to take the test. Accordingly, the State contends the trial court properly denied defendant's petition to rescind.

Section 11-501.1 of the Code sets forth the procedures which must be followed by law enforcement officials when requesting a driver submit to a chemical test, and the penalties imposed upon a driver for refusing. (Ill. Rev. Stat. 1991, ch. 95½, par. 11-501.1.) Section 11.501.1(c) provides "that a refusal to submit to [a breathalyzer test] will result in the statutory summary suspension of such person's privilege to operate a motor vehicle." (Ill. Rev. Stat. 1991, ch. 95½, par. 11-501.1(c).) Section 2-118.1 of the Code sets forth the procedures through which a person whose license has been suspended, pur-

suant to section 11-501.1 of the Code, may have a hearing to determine whether the statutory summary suspension should be rescinded. (Ill. Rev. Stat. 1991, ch. 95½, par. 2-118.1.) Section 2-118.1(b) of the Code requires such a person to "state the grounds upon which the person seeks to have the statutory summary suspension rescinded" when requesting such a hearing. (Ill. Rev. Stat. 1991, ch. 95½, par. 2-118.1(b).) According to this section, there are four areas of inquiries with respect to seeking rescission of a statutory summary suspension. One such area to which the scope of the rescission hearing is statutorily limited is whether the person, "after being advised by the arresting officer that the privilege to operate a motor vehicle would be suspended if the person refused to submit to and complete the test or tests, did refuse to submit." (Ill. Rev. Stat. 1991, ch. 95½, par. 2-118.1(b) (3).) This was one of the reasons advanced by defendant as a ground for the rescission of his suspension.

In a statutory summary suspension hearing, the burden of proof is on the motorist to present a *prima facie* case for rescission (*People v. Orth* (1988), 124 Ill. 2d 326, 338, 530 N.E.2d 210, 215), and in order for the motorist to prevail, the trial court must find defendant had satisfied his or her burden of proof by a preponderance of the evidence (*People v. Hawkins* (1991), 221 Ill. App. 3d 460, 463, 582 N.E.2d 243, 246; *People vs. Gafford* (1991), 218 Ill. App. 3d 492, 497, 578 N.E.2d 583, 586). Whether a defendant has met his burden of proof is a question of fact for the trial judge, and this determination cannot be overturned on review unless it is against the manifest weight of the evidence; that is, unless an opposite conclusion is clearly evident from the record. *Hawkins,* 221 Ill. App. 3d at 463, 582 N.E.2d at 246; *People vs. Bulman* (1991), 212 Ill. App. 3d 795, 801, 571 N.E.2d 850, 855; *People v. Misch* (1991), 213 Ill. App. 3d 939, 941, 572, N.E.2d 466, 467.

As case law suggests, the fact of a refusal must be based upon an objective review of the officer's question and defendant's response, and there cannot be a refusal to take a test unless the driver is asked to take the test. (*Brennan,* 122 Ill. App. 3d at 603, 461 N.E.2d at 1068.) A defendant is considered to have refused to submit to a breathalyzer test "where, after a clear warning of the ramifications resulting from a refusal [citation], an officer explicitly asks a defendant whether he, or she, will take the test, and the defendant,

by word, act or omission, clearly refuses to take the test." *Brennan*, 122 Ill. App. 3d at 603, 461 N.E.2d at 1068; see also *People v. Kern* (1989), 182 Ill. App. 3d 414, 416, 538 N.E.2d 184, 186.

While defendant was not explicitly asked in interrogative form to take the breathalyzer test, we find the trial court's conclusion defendant refused to take the test was not against the manifest weight of the evidence. As the facts illustrate, defendant was offered and refused to take the portable breathalyzer test. He was then admonished regarding the failure to submit to the breath or blood-alcohol tests. Defendant was asked if he understood the warnings, and he stated he did. He then affirmatively interjected his refusal to take the test and offered an explanation for his refusal. Given this sequence of events, the trial court could appropriately find the defendant refused to take the breathalyzer test. We reject any suggestion he would have taken the test if thereafter asked to do so. Accordingly, the trial court's ruling was not against the manifest weight of the evidence. To reverse the trial court's ruling would eviscerate the purposes and meaning of the implied-consent statute—to assist in the determination of whether motor vehicle drivers suspected of intoxication are in fact under the influence of alcohol and to make the streets and highways of the State safer for its citizens by making prosecution of intoxicated drivers easier and by suspending drivers' licenses upon refusal to submit to an intoxication test (*People v. Carlyle* (1985), 130 Ill. App. 3d 205, 210, 474 N.E.2d 9, 12)—and section 11-501.1 is instead to be liberally construed to accomplish its purpose of protecting the citizens of Illinois upon its highways (*People vs. Ellerbusch* (1983), 118 Ill. App. 3d 500, 503, 454 N.E. 2d 1166, 1168).

By affirming the trial court's ruling in this instance, we do not condone the failure of police officers to ask a defendant in specific question form to submit to the chemical tests. Unless a defendant is completely uncooperative, an officer should explicitly ask a defendant to take the required test before he concludes a defendant has refused. The failure of officers to strictly adhere to the implied-consent statute also eviscerates the purpose of the statute and encourages litigation with the possibility a trial court or a reviewing court might disagree with an officer's inference defendant refused. Cases

based solely on the failure of officers to ask defendants to submit to a breathalyzer test are a complete waste of judicial resources. Courts should not have to be making such determinations when the whole situation could be avoided by an officer simply asking the defendant a single question. In this case, however, the facts are as such to allow us to easily conclude defendant clearly refused to take the test.

The judgment of the trial court is affirmed.

Affirmed.

STEIGMANN, P.J., and GREEN, J., concur.

75359

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

Mr. James L. Ayers
Attorney at Law
114 S. Charter St.
Monticello, IL 61856

No. 75359 — People State of Illinois, respondent, v. Stephen A. Huisinga, petitioner. Leave to appeal, Appellate Court, Fourth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on June 25, 1993.